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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No.

KIMBLE GLASS COMPANY, a corporation, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable The Chief Justice of the United States and The Associate Justices of The Supreme Court of The United States:

Kimble Glass Company, an Ohio corporation, Petitioner herein (hereinafter referred to as "Kimble"), respectfully prays that a writ of certiorari be issued to review the judgment entered against it by the United States Court of Appeals for the Sixth Circuit on February 29, 1956. The judgment complained of ordered the enforcement of an order of the Respondent National Labor Relations Board, which was

issued by a sharply divided panel of the Board. During a heated campaign between two rival unions, Kimble had been faced with the prospect of violence and work stoppages in its plant. In an effort to eliminate what appeared to be the chief source of the tension and unrest among its employees, Kimble issued a rule prohibiting the wearing of union badges in the plant; and thereafter discharged 21 employees for deliberate violation of such rule. The Board majority held that, despite the abnormal conditions prevailing in the plant, issuance of the no-badge rule constituted an unfair labor practice, and ordered Kimble to reinstate the 21 discharged employees with back pay.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals is reported in 230 F. 2d 484 and is printed as an appendix to this petition (App. 1). The Court's subsequent denial of a rehearing on April 3, 1956, was without opinion (App. 1).

The Board's decision was issued on August 11, 1955, and is reported in *Kimble Glass Company*, 113 NLRB No. 58. Both the majority and dissenting opinions are set forth in the Appendix to Kimble's printed brief filed in the Court of Appeals (R. 305-25a).* The Trial

* The printed record before the Court of Appeals is embodied in the two separate Appendices to Kimble's brief and the Board's brief, respectively. Nine printed copies of these two Appendices are being filed with this petition pursuant to Section 4 of Rule 21 of this Court. In accordance with the Rules of the Court of Appeals, the pages of Kimble's printed Appendix bear the suffix "a" and the pages of the Board's Appendix bear the suffix "b." In this petition, all references to the pages of either of these Appendices will be preceded by the prefix "R", while references to the Appendix to this petition will be preceded by the prefix "App."

Examiner's Intermediate Report may be found at (R. 259-78a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 29, 1956 (App. 1). Thereafter, on March 17, 1956, within the time limit provided by the Rules of the Court of Appeals, Kimble filed a petition for rehearing. The Court of Appeals denied rehearing by order entered on April 3, 1956 (App. 1).

This Court has jurisdiction to review the judgment of the Court of Appeals under the provisions of 28 USC § 1254(1) and under the review provisions of the National Labor Relations Act, as amended, 29 USC § 160(f).

QUESTIONS PRESENTED

Whether prohibiting the wearing of union badges in a bona fide effort to prevent violence and interruption of production in petitioner's plant, and discharging 21 employees for deliberate violation of the prohibition, was an unfair labor practice in the light of the principle established by this Court in *Republic Aviation Corporation* v. *NLRB*, 324 U.S. 793 (1945).

STATUTES INVOLVED

The statutes here pertinent are Sections 7, 8(a)(1) and (3), and 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 157, § 158(a)(1), § 158(a)(3), and § 160(f). Relevant portions of these sections are printed in the Appendix to this petition (App. 5-7).

STATEMENT OF THE CASE

As stated in the opinion of the Court of Appeals, the union badge issue in the present case turned "upon undisputed evidentiary facts" (App. 1). However, in its opinion, the Board majority *ignored* some of the important undisputed facts, as the dissenting board member aptly pointed out in his opinion (R. 317a). Consequently, in this Statement of the Case, there will be summarized the salient facts established by *undisputed* evidence, some of which was erroneously excluded by the Trial Examiner, and wholly ignored by the Board majority.

In August, 1953, Kimble operated a large plant at Columbus, Ohio, which manufactured glass television tubes. The plant had a total of about 1,700 employees (R. 153a). For some years, the bargaining representative for the plant employees had been Glass Bottle Blowers Association of the United States and Canada, AFL (hereinafter referred to as "GBBA"). The plant contract included provisions for a union shop and a no-strike clause. Union relations at the plant had been peaceful; there was no background of any anti-union hostility on the part of Kimble.

The Special Circumstances Leading Up to and Surrounding Kimble's Order Banning the Wearing of Union Badges

About five weeks prior to the expiration of the existing union contract on September 1, 1953, a rival union, International Union of Electrical, Radio and Machine Workers, CIO (hereinafter referred to as "IUE"), began an organizing campaign at the Columbus plant, and some time thereafter petitioned the Board for a plant election. Early in August 1953, IUE supporters began to wear in the plant large union badges

about the size of a saucer, bearing in large letters the legend "IUE-CIO" (R. 56-57a). GBBA immediately ordered a supply of large badges to be worn by its supporters (R. 234-5a).

As soon as Plant Manager Gatti learned that rival union campaigns were in progress, he issued the following written instructions, applicable to the activities of both unions, to his supervisors:

> "Union campaigning will be permitted on company property only to the extent that it does not interfere with the operation or efficiency of the plant. The following rules will govern this activity:
>
> 1. Campaigning during working hours is not permissible.
>
> 2. Campaigning will be permitted during lunch and relief periods to the extent that it does not interfere with the operation of the plant, but only by employees during their regularly scheduled working hours. If this activity results in confusion or in people returning to work late, it will have to be discontinued" (R. 257-8a).

On August 6, an official of GBBA, Lewis, notified Gatti that his union members in the plant were highly incensed by the parading of the large IUE-CIO badges by their fellow employees and that he feared this would lead to acts of violence or work stoppages, or both, which the union officers would not be able to prevent or control (R. 56-8a, 96a, 177-9a). At first, Gatti was inclined to think that Lewis was exaggerating the gravity of the situation; but during the ensuing week and prior to the issuance of the no-badge order on August 14, he found from his personal observations in the plant, from the reports of his super-

visors, and from information secured directly from employees in the plant, some of whom were officers in the GBBA union, but most of whom were not,[1] that the wearing of the large union badges had given rise to a critical situation in the plant.

There was abundant undisputed evidence, much of which was erroneously excluded by the Trial Examiner, that during the period between August 6 and August 14 there were prevalent throughout the plant widespread threats of violence and walkouts, stemming from the high feeling and tension engendered among employees by the parading of the large union badges. This included the six employees whose threats were reported to Management by Superintendent Clark (R. 130-1a, 190-1a, 318a); the witnesses Thiel (R. 246-50a, 135-7a, 150-1a), Lock (R. 218-20a), Raver (R. 244a), and Kerekes (R. 244a); and also a Board witness, Tackett, who stated that there were other IUE supporters in the plant who would be wearing their union badges if they were not afraid of having the badges ripped off because of the high feeling in the plant (R. 75a, 145-6a, 161-2a, 168-9a).

In addition, evidence of a more tangible character was proffered to show that Kimble had reasonable grounds for apprehension of sudden outbreaks of violence and "wildcat" work stoppages in the plant. Kimble offered evidence of two serious fist fights which occurred during this period among its employees, involving the employees Smales (R. 230a) and Oakes (R. 245-6a). While neither of these fights arose over union badges (the one involving Smales

[1] All employees of the plant, other than supervisors, were necessarily members of GBBA as a consequence of the union shop clause.

grew out of the distribution of union literature at the plant entrance), they graphically illustrated the high feeling between the supporters of the rival unions.

Evidence was also offered of a series of "wildcat" work stoppages which had taken place at the plant during the last three months preceding August 1953. Since May 1953, notwithstanding the no-strike clause in the contract, there had been three wildcat work stoppages in which the GBBA union had not been able to control its members. One of such stoppages had occurred as late as July 17, 1953, resulting in a large loss to Kimble (R. 70-2a, 188a). While these work stoppages occurred prior to the outset of the union campaigns, and hence did not involve the wearing of union badges, they demonstrated the likelihood of sudden walkouts by angry employees, against which the no-strike clause afforded no protection. Moreover, evidence was offered of a fourth work stoppage in the Forming Department of the plant on August 12, 1953; this incident grew directly out of resentment of several machine operators over the parading of the large union badges by their fellow employees; and a stoppage of operations in that department was only prevented at the last moment by the personal intervention of Lewis (R. 179-81a). In a glass plant, with continuous and highly integrated operations, a work interruption of only a few minutes can seriously disrupt production throughout the plant (R. 194a).

Kimble already had a posted plant rule prohibiting fighting (R. 82-3a, 94a); and in addition, as conceded in the Board majority's opinion, it "instructed supervisors to warn employees that they would be subject to discharge if they engaged in acts of violence * * *." (R. 310a). But as the unrest continued and threats

of violence and work stoppages were still prevalent, Kimble did not believe that these measures were sufficient to prevent trouble.

Faced with this critical situation, the Plant Manager, after conferring with his top plant supervisors, and after having consulted his superiors and an attorney at Kimble's main office in Toledo (R. 125a), decided that the best way to avert serious trouble in the plant was to remove the chief *source* of the unrest by banning the further wearing of union badges during the heated union campaign (R. 125-8a). Thereupon, on August 14, the following order was promulgated by Kimble and posted on all plant bulletin boards:

"August 14, 1953

"PLANT BULLETIN

"To: ALL EMPLOYEES

"*Effective at once and until further notice, the wearing of any union insignia or badge is prohibited on company property at any time.*

"Trouble among our employees has already occurred. This rule is necessary in order to maintain harmonious relations in our plant and to prevent anything of a real serious nature from developing.

"We are instructing our foreman to enforce this rule, and would sincerely appreciate voluntary cooperation of all of our employees in this matter.

"R. W. GATTI
Plant Manager"
(R. 257a)

GBBA instructed its members to comply with the no-badge rule, and they did so (R. 182-3a). On the other hand, IUE instructed its members to wear their badges in defiance of the rule (R. 118a). There was no discrimination in the rule or in its enforcement.

On August 17, a group of IUE supporters were observed in the plant wearing the large union badges. They were earnestly requested by Management to remove the badges so it would not be necessary to discharge them for violation of the posted rule; and on this occasion they did so (R. 78a). However, on two later occasions, on August 19 and 20, there were 21 IUE supporters who refused to remove their large badges when requested to do so, whereupon they were discharged. The discharge of these 21 men for deliberate violations of the posted rule gave rise to the controversy in the present case.

The Board's Decision

The 3-member panel of the Board (Murdock, Peterson, and Rodgers) divided sharply in disposing of the case. The two majority members accepted *in toto* the conclusions of the Trial Examiner on the union badge issue (R. 305a), and though stating that they had some doubt as to the correctness of the Examiner's rulings on the admissibility of some of the excluded evidence, they said that consideration of the excluded evidence would not change their conclusions (R. 305a, Footnote 2). In the course of their opinion, however, the majority members indicated that they considered irrelevant the proffered evidence of employee threats excluded by the Examiner, where such threats had not been brought directly to Kimble's attention *before* the no-badge rule was adopted (R. 307a, Footnote 6);

and they also indicated that, in view of the no-strike clause, threats of work stoppages by employees should be given little if any weight in determining whether the issuance of the employer's no-badge rule was justified (R. 309-10a).

The Board majority concluded that "no such special circumstances existed in this case as would justify the no-badge rule" (R. 312a). The reasoning by which they reached this conclusion may be summarized as follows: while they recognized that Kimble was faced with a tense situation which called for some disciplinary action, they felt the employer had adopted the wrong procedure; that in issuing the no-badge rule, Kimble had yielded too easily to pressure brought upon it by the GBBA union; that instead, Kimble should have adopted some sort of disciplinary measures directed against the employees who had made threats of violence or work stoppages;[2] and intimated that the employer should have waited until some outbreaks of violence or work interruptions had actually taken place (R. 308-11a).

In his dissenting opinion, Board Member Rodgers vigorously disagreed with the reasoning and conclusions of the majority (R. 317-25a). After pointing out that the majority opinion did not take into account all of the undisputed circumstances (R. 317a), and after reviewing the facts in some detail, Rodgers'

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[2] It can hardly be contended that the so-called "specialized field of knowledge" of Board members makes them better equipped than the employer to determine what disciplinary measures can be practicably invoked during a tense situation in a large industrial plant. "Expertness is not a magic wand which can be indiscriminately waved over the corpus of an agency's findings to preserve them from review": Jaffe, "*Judicial Review: Question Of Fact*," 69 Harv. L. Rev. 1020, 1039 (1956).

conclusion was that the issuance of the no-badge rule was thoroughly justified under the doctrine of the *Republic Aviation* case and under the decision of the Ninth Circuit in *Boeing Airplane Company* v. *NLRB*, 217 F. 2d 369 (CA 9, 1954). He vigorously rejected the majority's reasoning that some other type of disciplinary measure should have been invoked by Kimble, pointing out that the employer had to act under the exigencies of the situation as it then existed, and that its choice of action should not be "second guessed" by the Board long afterward (R. 323-4a). He also rejected the concept that Kimble "was obligated to await an outbreak of actual violence before it acted to remove the cause" (R. 324-5a).

Rodgers summarized his conclusions from the undisputed evidence as follows:

> "If ever there was a situation where special circumstances existed which warranted the promulgation of a rule designed to avert violence between adherents of rival unions, this is it. The record is abundantly clear that the Respondent was genuinely concerned over the repeated and persistent threats of violence and work stoppage provoked by the wearing of the union insignia. * * *" (R. 323a)

The Decision of the Court of Appeals

Following the issuance of the Board's decision and order on August 11, 1955, Kimble filed its petition for review in the Court of Appeals for the Sixth Circuit, pursuant to Section 10(f) of the National Labor Relations Act, as amended, 29 USC § 160(f). The Board filed an answer praying for enforcement of the Board's order. On February 29, 1956, the Court of Appeals handed down a *per curiam* opinion

enforcing the Board's order: 230 F. 2d 484 (CA 6, 1956). The Court said:

> "* * * The Board, upon undisputed evidentiary facts, found that petitioner's prohibition of the wearing of union badges by its employees was not justified by exceptional circumstances. See Republic Aviation Corp. v. N.L.R.B., 1945, 324 U.S. 793, 65 S. Ct. 982, 89 L. Ed. 1372; Boeing Airplane Co. v. N.L.R.B., 9 Cir., 1954, 217 F. 2d 369, especially 374-375. While this court might not have so found, there is, viewing the record as a whole, substantial evidence to support the Board's finding. * * *"

On March 2, 1956, just two days after the Sixth Circuit's decision, the Court of Appeals for the Seventh Circuit reached the opposite result in the companion union badge case of *Caterpillar Tractor Company* v. *NLRB*, 230 F. 2d 357 (CA 7, 1956) (App. 2). Thereupon Kimble filed a petition for rehearing calling attention to the conflicting decision in the Seventh Circuit. On April 3, 1956, the Court of Appeals entered an order denying the rehearing (App. 1).

ARGUMENT

The Board majority stated the underlying question in this case as follows:

> "Whether all the facts and circumstances surrounding the promulgation of the no-button rule were such as to justify restricting the employees in the exercise of their statutory right to wear union buttons is the issue in the case which the Board is duty bound to decide." (R. 312a).

Since the decision in *Republic Aviation Corporation* v. *NLRB*, 324 U.S. 793 (1945), it has been settled that

the right of an employee to wear his union badge while at work is *not absolute*. In that case, this Court said at pages 797-8:

> "These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society."

As there was no evidence of "unusual conditions" existing in the employer's plant, 324 U.S. at 801, there was no occasion for the Court to spell out what circumstances would justify the issuance of a no-badge rule by the employer. This Court did specifically recognize the right of employers "to maintain discipline in their establishments". And it is submitted that the Board has not correctly applied this rule in its disposition of union badge cases; on the contrary, the Board has adopted such strict criteria or standards for proof of the required "special circumstances" or "unusual conditions" that the right of employers "to maintain discipline" has been effectively emasculated.

Review of the judgment of the Court of Appeals for the Sixth Circuit, granting enforcement of the Board majority's order in the present case, is merited for at least four different reasons, which will now be discussed.

1.

The Decision of the Court of Appeals for the Sixth Circuit in the present case is in conflict with the Decision of the Court of Appeals for the Seventh Circuit in Caterpillar Tractor Company v. NLRB, 230 F. 2d 357 (1956) (App. 2), and with the Decision of the Court of Appeals for the Ninth Circuit in Boeing Airplane Company v. NLRB, 217 F. 2d 369 (1954)

CONFLICT WITH THE CATERPILLAR TRACTOR CASE.

On August 11, 1955, the Board handed down decisions and orders in two cases involving the question of what constitutes "special circumstances" justifying issuance of a no-badge rule by an employer: *Kimble Glass Company*, 113 NLRB No. 58, and *Caterpillar Tractor Company*, 113 NLRB No. 37. In both cases, the facts upon which the Board had reached its conclusions were found by the reviewing courts to be *undisputed* and in both the Board rendered decisions adverse to the employers. In the *Kimble* case, the Court of Appeals for the Sixth Circuit handed down on February 29, 1956, a *per curiam* opinion (230 F. 2d 484) enforcing the Board's order, although indicating that the Court itself might not have reached the same conclusions on the undisputed evidence. Two days later, on March 2, 1956, the Court of Appeals for the Seventh Circuit, reached a contrary result in the *Caterpillar* case, 230 F. 2d 357, (App. 2).

The remarkable similarity of the two cases, from the standpoint of the facts and their history before the Board, and the disparate results reached by the 6th and 7th Circuits, may be illustrated by the following comparison:

KIMBLE CASE

The Undisputed Facts:

During an organizational campaign between rival unions in Kimble's plant of 1700 employees, a group of employees wore large saucer-size badges, over 4 inches in diameter, bearing in large letters the legend "IUE-CIO". The wearing of such badges over a period of several days led to widespread unrest and threats of violence and work stoppages in the plant, the evidence as to such abnormal conditions being supplied not only from officers of the incumbent union, but also from rank and file employees in the plant. The explosive atmosphere there created was exemplified by two fist fights occurring between employees outside the plant; and the danger of "wildcat" walkouts of employees, despite the no-strike clause in the union contract, was demonstrated by at least four such work stoppage incidents which had occurred at the plant within the last three months, one of these incidents stemming directly from the wearing of the large badges.

After the large badges had been "paraded" in Kimble's plant for about 10 days, it issued a rule prohibiting further wearing of the badges, in an effort to avoid outbreaks of violence and work interruptions. The no-badge rule applied to both unions, and was enforced without discrimination. For de-

CATERPILLAR CASE

The Undisputed Facts:

The incumbent union was attempting to organize the remaining 450 of Caterpillar's 1900 employees. 1000 buttons were worn by the union members bearing different slogans such as "I'M PAYING MY WAY ARE YOU?", "DON'T BE A SCAB", "DON'T BE A FREE RIDER", and "I JOINED HAVE YOU?". 250 of these slogans, about 2½ inches in diameter, bore the slogan "DON'T BE A SCAB". Two days after such buttons appeared, Caterpillar notified its employees that they would be sent home if there was any further wearing of the "Scab buttons", as the employer felt such action would be disruptive of employee harmony and discipline in the plant. Caterpillar did not ban the wearing of buttons bearing the other slogans mentioned.

The employer adduced no proof whatsoever of any actual incidents of trouble caused by the wearing of the badges, or of any employee unrest in the plant resulting therefrom. For violation of its order banning the "Scab" buttons, Caterpillar suspended and sent home 247 employees. There was no background of anti-union hostility on the part of the employer.

liberate violation of such order, 21 employees were discharged, after they had been urged on two separate occasions to remove their badges.

Kimble's union relations had been peaceful and harmonious; the plant had been organized for several years, and there was no background of anti-union hostility on the part of the employer.

Consideration of Case in the Board:

Within the Board, the case was considered by a 3-member panel consisting of Murdock, Peterson and Rodgers. The case was considered by this panel simultaneously with the *Caterpillar Tractor* case, the decisions in both cases being released at the same time.

The Board Decision (113 NLRB No. 58)

The Board majority (Murdock and Peterson) concluded:

"In a plant of approximately 1500 employees, we do not believe that the situation there prevailing, as indicated in the evidence the Trial Examiner received and the evidence he excluded, constituted the special circumstances contemplated by the *Boeing* principle which warranted depriving employees of their rights to wear union insignia in aid of their organiz-

Consideration of Case in the Board:

See comments opposite under *Kimble* case.

The Board Decision (113 NLRB No. 37)

The Board majority (Murdock and Peterson) said that the employer had not made the required showing of "special circumstances", saying:

"The 'Scab' button was worn for approximately 2½ days before its ban, and yet the record fails to disclose a single instance in which the Respondent's production processes suffered interruption or the threat of interruption, nor does it indicate that so much

ing campaign to supplant the GBBA. * * *" (R. 308a).

The Board majority reached this conclusion by the following line of reasoning: while they recognized that Kimble was faced with a tense situation in the plant which called for some form of disciplinary action, they felt the employer had adopted the wrong procedure: that in issuing the no-badge rule, Kimble had yielded too easily to pressure brought upon it by the GBBA union; that instead, Kimble should have adopted disciplinary measures directed against the employees who had made threats of violence or work stoppages, or should have waited until some outbreaks had actually occurred (R. 308-11a). They said it was "irrelevant to talk about the Respondent's good faith motivation" (R. 312a).

Board Member Rodgers vigorously dissented. He said that the alternative disciplinary measures suggested by the majority were impracticable in a large plant, and that:

"* * * The Employer should not be held to have violated the law merely because a majority of the Members of this Board, in an *ex post facto* situation, far removed from the exigencies of the problem, feel, in their judgment, that some other action or actions on the part of the employer *might possibly* have been as a solitary murmur of resentment was heard from any employee because of the display of that button."

The Board majority also said that the good faith motives of the employer were wholly immaterial, and ordered the employer to reimburse the 247 employees for their lost pay during the short suspension period (they had later returned to work).

Board Member Rodgers vigorously dissented, on the ground the employer's apprehensions of trouble from the wearing of the "Scab" badges justified the no-badge order, and said that it was not necessary for the employer to await actual outbreaks of violence in its plant before acting, citing the *Maryland Drydock* case.

sufficient to cope with the situation. * * *" (R. 324a).

"Neither can I agree with the implication in the majority decision that the Respondent was obligated to await an outbreak of actual violence before it acted to remove the cause. The Fourth Circuit answered this point of view in concise fashion in *Maryland Dry Dock Company* v. *N.L.R.B.*, 183 F. 2d 538, * * *" (R. 324-5a).

* * * *

"If ever there was a situation where special circumstances existed which warranted the promulgation of a rule designed to avert violence between adherents of rival unions, this is it. * * *" (R. 323a).

The Sixth Circuit's Decision of February 29, 1956 (230 F. 2d 484):

The Court said:

"* * * The Board, upon *undisputed evidentiary facts*, found that petitioner's prohibition of the wearing of union badges by its employees was not justified by exceptional circumstances. See *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793 (1945); *Boeing Airplane Co.* v. *N.L.R.B.*, 217 F. (2d) 369, especially 374-375 (9 Cir.,

The Seventh Circuit's Decision of March 2, 1956 (230 F. 2d 357):

The Court referred twice to Rodgers' dissenting opinion and said:

"*The facts are not in dispute: the sole controversy is as to their legal effect.*" (Italics ours).

* * * *

"We are convinced that the Board erroneously interpreted Section 7 and that its order must be set aside. The fine balance between protected and unprotected activities in

1954). *While this court might not have so found*, there is, viewing the record as a whole, substantial evidence to support the Board's finding. * * *" (Italics ours).

membership solicitation is pointed up by the Supreme Court in *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 797-798 * * *."

"We are of the opinion that Petitioner's anticipation that the 'Scab' buttons would prove disruptive of employee harmony in its plant and destructive of discipline in production was fully justified. It was under no compulsion to wait until resentment piled up and the storm broke before it could suppress the threat of disruption by exercising its right to enforce employee discipline."

Concededly the badge in the *Caterpillar* case said "Don't be a Scab" while the badge in the instant case said "IUE-CIO." But the Board considered the factual situations as comparable. Both involved no-badge rules, were considered by the same panel of the Board, were decided on the same day, and the same result was reached in each by the same split in the panel. To the extent that there is a *factual* distinction, it lies only on the surface, and there is a fundamental divergence in principle between the Seventh Circuit's *Caterpillar* decision and the Sixth Circuit's decision in this case.

The important and controlling circumstance is *not* what was inscribed on the badges, but what *effect* the evidence may show that the wearing of the badges *actually* had or was likely to have upon employees, whether caused by the inscriptions on the badges, their size, their color, the manner in which they were worn,

or otherwise. An employer's right to ban any particular union badge must be weighed not alone in the light of what may be inscribed upon it, but also in the context of any disruptive influence that the wearing of such badge may actually have.

In the *Kimble* case, the undisputed evidence showed that the "parading" of the large union badges was the chief source of the unrest and tension in the plant, thus tending to disrupt production and break down employee discipline, even though the inscriptions on the badges might not be offensive in and of themselves. In the *Caterpillar* case, since evidence of any actual unrest in the plant was absent, the Seventh Circuit condemned the "Scab" badges because of their "inherent disruptive influence"; but Judge Lindley made it clear in his opinion that such insignia must be judged on the basis of whether they "disrupt, *or tend to disrupt production, and to break down employee discipline*" (Emphasis supplied).

It is submitted that the decisions of the Sixth and Seventh Circuits are in irreconcilable conflict in their interpretation and application of the *Republic Aviation* rule. The fact that in the *Kimble* case the badges were disruptive of employee discipline because of the demonstrated reaction of the employees to them, while in the *Caterpillar* case the inscriptions on the badges were regarded as offensive *per se*, affords no sound basis for distinguishing the cases, for the underlying principle under the *Republic Aviation* rule in both cases must be the same.

The Conflict with the Ninth Circuit's Decision in the Boeing Airplane Case.

The Sixth Circuit's decision in the present case is also in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Boeing Airplane Company* v. *NLRB*, 217 F. 2d 369 (CA 9, 1954). The controversies involved in that case arose shortly after the end of a violent strike at the Boeing plant. One employee was suspended by the employer for wearing a small union committeeman's badge after being ordered to remove it. Another employee was suspended for wearing a union "streamer". The Board held that the employer violated the Act in both instances.

The Court of Appeals very "reluctantly" upheld the Board's ruling upon the suspension of the badge wearer. In so ruling, however, the Court said the Board had "misconstrued" the *Republic Aviation* case, saying at page 374:

> "* * * The Court is of opinion that both Examiner and Board misconstrued a certain reference of the Supreme Court in Republic Aviation Corp. v. National Labor Relations Board, 324 U.S. 793, 802, n. 7, 65 S. Ct. 982, 89 L. Ed. 557, which is inapplicable here on the facts. More weight might have been given here to the highly explosive situation where the union, the insignia of which was being flaunted, had just come off a violent strike subsequently declared illegal, had been declared by the company no longer the bargaining agent, and was faced with a rival union for the first time."

However, the Court set aside the Board's finding on the suspension of the employee wearing the union streamer, saying at pages 374-5:

"The Board, perhaps misled by the Republic case, considered there was a violation. This Court believes that the attitude and temper of the Examiner were more judicial, and adopts his expression quoted above. The keeping of peace between rival unions was important, and the Board should have so viewed it.

* * * * *

"With such extremely inflammable materials as the passions of the rival unions, the Teamsters and 751, the wearing of the streamers and shop buttons must be viewed as the spark which might in a second set everything afire again. No doctrine can give immunity to symbols and expressions which are incitements to crime or violent action in breach of peace. * * *"

2.

The Decision of the Court of Appeals for the Sixth Circuit conflicts in principle with the Recent Decision of this Court in NLRB v. Babcock & Wilcox Company, 351 U.S. 105

The Court of Appeals summarily disposed of this case on the theory that substantial evidence supported the Board's finding of fact. The same reasoning was followed in *NLRB* v. *Ranco*, 222 F. 2d 543 (CA 6 1955), reversed, *NLRB* v. *Babcock & Wilcox Company*, decided April 30, 1956.[3] In the *Babcock & Wilcox* case, this Court pointed out (351 U.S., at 112-113):

"The determination of the proper adjustments rests with the Board. Its rulings when reached on findings of fact, supported by substantial evidence on the record as a whole, should be sustained by the courts *unless its conclusions rest on*

[3] The *Ranco* case from the Sixth Circuit, disposed of by the same opinion, was No. 422 on the docket of this Court at its October Term, 1955.

> *erroneous legal foundations.* Here the Board failed to make a distinction between rules of law applicable to employees and those applicable to non-employees." (Italics ours).

We submit that, by the same token, the Board majority's decision in the *Kimble* case, where the facts were undisputed, rested on "erroneous legal foundations", in the sense that it drew erroneous conclusions and gave erroneous effect to *undisputed facts.* For, as Judge Lindley pointed out in the *Caterpillar* case, where the facts before the Board are not in dispute, "the sole controversy is as to their legal effect".

The approach to this case by the Sixth Circuit was purely factual when, in truth, there was no factual controversy. Contrary to the review afforded by the Seventh Circuit and, more particularly, in direct opposition to this Court's views in *Babcock & Wilcox*, the Court did not stop to inquire about the "erroneous legal foundations" upon which the Board based its findings.

The distribution of union literature and the wearing of union badges fall within the same general sphere of organizational activities. The Board majority's decision, upheld by the Sixth Circuit, represented an erroneous legal conclusion on undisputed facts, contrary to this Court's decision in the *Babcock & Wilcox* case.[4]

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[4] In the *Kimble* case, the Trial Examiner found in his Report that the employer had violated the Act in prohibiting distribution of union literature by employees at the plant entrance (R. 271-5a). However, the Board rejected the Examiner's finding on this issue (R. 313a).

3.

The concept in the Board's majority decision, which the Court of Appeals enforced, that widespread threats of work stoppages in an employer's plant, arising from the parading of large union badges by employees during a heated organizational campaign between rival unions, cannot, in the light of a no-strike clause in the union contract, be considered in determining whether the employer was justified in prohibiting the wearing of such badges, in an effort to maintain discipline and production, is contrary to the principles laid down in the Republic Aviation case

In the present case, Kimble relied, in justification of its issuance of the no-badge rule, upon its apprehension of trouble in the plant because of widespread threats of violence and work stoppages made by many different employees, such threats growing out of the high feeling engendered by the wearing of the large union badges. Kimble felt that it was justified, when confronted by such a situation, in taking disciplinary measures reasonably designed to prevent both violence and interruption of production. But the Board majority, emphasizing the fact that there was a no-strike clause in Kimble's union contract, adopted an entirely different concept of the employer's right with respect to maintenance of production. The Board majority said in its opinion:

> "* * * In fact, with respect to the threatened work stoppages we note that such work stoppages would have been in clear violation of the Respondent's contract with the GBBA. Moreover, threats of work stoppages cannot be considered like threats of violence in determining whether special circumstances exist for modifying the statutory rights of employees. Strike threats offer no justification for limiting employees' organizational rights. While some circumstances may permit modification of employee rights in the interest of maintaining production, in our opinion,

> such circumstances are limited to those which interrupt the carrying on of production when employees are at work, not those which might affect production as a result of employees' withholding their services in a labor dispute because the employer does not meet their demands. Our dissenting colleague, however, apparently treats threats to strike equally with threats of violence as justification for the proscription of the right to wear union buttons." (R. 309-10a).

The effect of the adoption of this concept by the Board majority was that, in determining whether Kimble was justified in issuing its no-badge rule, no weight whatever was given to the serious danger of wildcat work stoppages which confronted the employer at the time. Yet, the evidence showed that there had been a series of such work stoppages at Kimble's plant during the preceding three months, against which the no-strike clause had in actual practice afforded no protection. One of the work stoppage incidents (the one on August 12, 1953) stemmed directly from the wearing of the union badges (R. 179-81a). Under its concept, the Board ignored entirely the evidence bearing on threats of work stoppages, and the actual incidents of such stoppages shown by the evidence. Moreover, in this case there was no strike involved; rather, what Kimble sought to avoid by the no-badge rule were repeated incipient work stoppages unconnected with a dispute between it and its employees.

In the *Republic Aviation* case, this Court referred to the "equally undisputed right of employers to maintain discipline in their establishments". We do not believe that it was intended to restrict the employer to disciplinary action solely directed toward the pre-

vention of acts of violence, as distinguished from "wildcat" work stoppages, where the union contract happened to contain a no-strike clause. The actual experience of the employer here had amply demonstrated that the union could not control its members to such an extent as to prevent sudden walkouts, when they became enraged over occurrences in the plant.

4.

The Board has, in the present case and other union badge cases, through the application of unreasonable and erroneous criteria or standards for the determination of the so-called "special circumstances" which would justify a no-badge rule, so misconstrued and misapplied the principles of the Republic Aviation case as, in effect, to ignore entirely the employer's rights recognized in that case. This presents recurring uncertainties in the administration of the National Labor Relations Act which should be authoritatively settled by this Court

The *Republic Aviation* case lays down the general principle that in the consideration of controversies arising over an employer's restrictions against employees on the wearing of union badges or the distribution of union literature, the Board must work out "an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments" (324 U.S., at 797-8).

However, in the actual application of this rule to union badge cases, the Board has consistently traveled a "one way street". In all of the three union badge cases which it has decided since the *Republic Aviation* case, the Board has uniformly held, irrespective of how abnormal and tense the plant conditions might be, that the employers had not made

a showing of the so-called "special circumstances" which would justify the issuance of a no-badge rule. Two reviewing Courts of Appeal, in the *Boeing* and *Caterpillar Tractor* cases, have disagreed with the Board's use of such "weighted" scales.

In *Boeing Airplane Company* v. *NLRB*, 217 F. 2d 369 (CA 9, 1954), at a time of high tension in the plant shortly following a rather violent strike, two different employees were suspended by Boeing, one for wearing a small union committeeman's badge, and the other for wearing a union "streamer". The Court of Appeals, after commenting (217 F. 2d at 374) that the Board had "misconstrued" the *Republic Aviation* case, reluctantly upheld the Board's order with respect to the union badge incident, but set aside the Board's ruling with respect to the union streamer. In so doing, the Court indicated that in its opinion the Board had applied too harsh standards in weighing the employer's conduct in the light of the explosive situation which confronted Boeing. The Court said:

> "The Board, perhaps misled by the Republic case, considered there was a violation. * * * The keeping of peace between rival unions was important, and the Board should have so viewed it." (217 F. 2d, at 374-5).

In the *Caterpillar* case, in reversing the Board, the Court of Appeals for the Seventh Circuit said (230 F. 2d 358):

> "The Board concluded that wearing the button during working hours was a protected activity within the purview of Section 7 of the Act, and, that, by suspending the 247 employees for wearing it in the work shop, petitioner violated § 8 (a) (1) and (3) of the Act. * * *
>
> * * * * *

> "We are convinced that the Board erroneously interpreted Section 7 and that its order must be set aside. The fine balance between protected and unprotected activities in membership solicitation is pointed up by the Supreme Court in Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797-798: * * *"

It seems apparent from its handling of this series of union badge cases that the Board has misapplied the *Republic Aviation* rule by setting up unreasonable standards for the proof of "special circumstances". In the *Kimble* case, this is illustrated by the Board majority's ruling, already referred to, that threats of work stoppages are to be given little or no weight, in the light of the no-strike clause (R. 309-10a); in its refusal to consider any evidence of threats of violence made by rank and file employees in the plant, unless such threats were actually communicated to Management *before* issuance of the no-badge rule (R. 307a, Footnote 6);[5] in its ignoring of the proffered evidence of two actual fist fights between plant employees, and of four different work stoppage incidents at the plant; and in its view, which the dissenting member aptly

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[5] We do not perceive any reasonable basis for the Board majority's view that the existence and prevalence of such threats could not be considered relevant or material, unless communicated to Management *before* issuance of the no-badge rule. The employer was faced at the time with a critical situation, and had to act promptly. Certainly, the employer should have the right to prove later that its estimate of the explosive situation in the plant was correct, by showing the widespread prevalence of threats throughout the plant, even though the identity of the particular individuals making such threats may not have been known to it at the time. In any event, prior to issuing the rule, Kimble had notice of some threats of both violence and work stoppages, and of actual incidents of violence and work stoppages involving plant employees, see pages 6-7, *supra*.

said was implicit in the majority decision, that the employer must "await an outbreak of actual violence before it acted to remove the cause" (R. 324-5a).

These requirements of the Board constitute, it is submitted, a violent misapplication of the *Republic Aviation* principle in union badge cases. The Board's findings against employers in these cases are premised upon erroneous legal conclusions and, in the final analysis, where such legal conclusions are erroneous, they cannot properly be upheld on the theory that they are supported by "substantial evidence" as the Sixth Circuit said in this case. *NLRB* v. *Babcock & Wilcox Company, supra.*

CONCLUSION

WHEREFORE, the Petitioner respectfully prays that a writ of certiorari be granted for review of the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

Respectfully submitted,

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June 29, 1956.

APPENDIX

Proceedings in the United States Court of Appeals for the Sixth Circuit. Kimble Glass Co. v. N.L.R.B.

CAUSE ARGUED AND SUBMITTED

February 15, 1956

Before: Martin, Miller and Stewart, Circuit Judges.

This cause is argued by James M. Guiher for petitioner and by Louis Schwartz for respondent and is submitted to the court.

Judgment

(Filed February 29, 1956)

This case, involving a petition to review and set aside an order of the National Labor Relations Board and the Board's cross-petition for enforcement, was heard on the briefs, record and oral argument of counsel. The Board, upon undisputed evidentiary facts, found that petitioner's prohibition of the wearing of union badges by its employees was not justified by exceptional circumstances. See *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793 (1945); *Boeing Airplane Co.* v. *N.L.R.B.*, 217 F. (2d) 369, especially 374-375 (9 Cir., 1954). While this court might not have so found, there is, viewing the record as a whole, substantial evidence to support the Board's finding. Cf. *N.L.R.B.* v. *Hudson Motor Car Co.*, 128 F. (2d) 528 (6 Cir., 1942). The Board's order, in the usual form, was a reasonable exercise of its powers. See *N.L.R.B.* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938).

It Is Ordered that the Board's order be and it hereby is enforced.

Order Denying Rehearing, Kimble Glass Co. v. N.L.R.B.

(Filed April 3, 1956)

The petition for rehearing is denied.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CATERPILLAR TRACTOR CO., a corporation, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition to Review and Set Aside an Order of the National Labor Relations Board.

March 2, 1956.

Before LINDLEY, SWAIM, and SCHNACKENBERG, Circuit Judges.

LINDLEY, CIRCUIT JUDGE. Caterpillar Tractor Company seeks to set aside an order entered by the Board based on the latter's finding that petitioner had violated subsections 8 (a) (1) and (3) of the National Labor Relations Act, as amended, 29 U. S. C. § 158 (a) (1) and (3). The facts are not in dispute; the sole controversy is as to their legal effect.

District Lodge No. 55, International Association of Machinists, AFL, hereinafter referred to as the union, is the certified bargaining agent for petitioner's production employees at its plant in Joliet, Illinois. In February 1954, approximately 1,450 of the some 1,900 employees in the bargaining unit were members of the union. For an extended period of time, the relations between the employer and the union had been entirely amicable and cooperative. During February the union began a membership drive. For this purpose, 1,000 advertising slogan buttons were distributed to its members, 250 of which were emblazoned with the slogan "Don't be a Scab." The others bore such legends as "Don't be a Free Rider." The "Scab" buttons were first worn in the shop on February 24. Petitioner did not demur to the use of other

buttons but advised the union's business agent that it objected to the "Scab" emblems being worn in the shop, because of their tendency to incite unrest and resentment among union and nonunion employees and to disturb the peaceful, friendly atmosphere which had continued between petitioner and the union for a number of years. Despite this protest, wearing of the "Scab" buttons continued throughout the remainder of the week. On Friday, February 26, the employer advised all such wearers that they would be sent home if they returned to work the next working day wearing the buttons. On March 1, the next working day, 247 employees reported for work wearing the offensive badge and were sent home. On the same day, the union agreed to suppress the emblem pending the Board's decision on unfair labor charges based on petitioner's suspension of these employees. On March 2, all employees returned to work without the objectionable buttons, and that status has since prevailed.

The Board concluded that wearing the button during working hours was a protected activity within the purview of Section 7 of the Act, and, that, by suspending the 247 employees for wearing it in the work shop, petitioner violated § 8 (a) (1) and (3) of the Act. A cease and desist order was entered, which required, *inter alia*, reimbursement for the time lost to the suspended employees. 113 N. L. R. B. No. 37. Member Rodgers filed a vigorous dissenting opinion.

We are convinced that the Board erroneously interpreted Section 7 and that its order must be set aside. The fine balance between protected and unprotected activities in membership solicitation is pointed up by the Supreme Court in *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793, 797-798: "These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of

employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society."

Thus, in its application to organizational activities, the protective mantle of Section 7 is tempered by the employer's right to exact a day's work for a day's pay and to maintain discipline, and does not reach activities which inherently carry with them a tendency toward, or likelihood of, disturbing efficient operation of the employer's business. Perhaps no greater disruptive force can be found in the field of labor relations than that innate in the application of the term "scab" to one employee by his fellow workman. The term, when applied to one embraced in a labor group, bears an inescapable connotation of approbiousness and vileness commonly recognized by all members of modern American society. As we said, in *NLRB* v. *Aintree Corp.*, 135 F. 2d 395, 397 (CA-7), "Probably no words are more insulting to, or arouse keen resentment more promptly in, an employee than to call him 'a scab'." See Member Rodgers Dissent, 113 N. L. R. B. No. 37.

We are of the opinion that petitioner's anticipation that the "Scab" buttons would prove disruptive of employee harmony in its plant and destructive of discipline in production was fully justified. It was under no compulsion to wait until resentment piled up and the storm broke before it could suppress the threat of disruption by exercising its right to enforce employee discipline. Although the union, on March 1, after the event, distributed literature to all employees protesting, in effect, that it used the term "scab" as synonymous with that of "free rider", its inarticulateness in the use of specific

words on the button did not in any way serve to lessen petitioners legitimate concern over the universally recognized explosive nature of the ill-chosen word.

In view of the zealous argument advanced by petitioner, we think it wise, perhaps, to negate the erroneous position which we understand it takes that it could properly have prohibited any organizational activity on company time, and might, also, have forbidden the wearing of the other slogan buttons employed in the union's campaign. We think its right in this respect is limited to the restriction of activities which disrupt, or tend to disrupt, production and to break down employee discipline, and does not include restriction of passive inoffensive advertisement of organizational aims and interests, i.e., the wearing of advertising insignia and buttons, which in no way interferes with discipline or efficient production. *Cf. Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793. The "Scab" insignia falls because of its inherent disruptive influence.

The order is set aside.

Statutes Involved

The statutes here pertinent are Sections 7, 8(a)(1) and (3), and 10(f) of the National Labor Relations Act, as amended, the relevant portions thereof being as follows:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor

organization as a condition of employment as authorized in section 158(a)(3) of this title."

(29 USC § 157)

* * * * *

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;"

(29 USC § 158(a)(1))

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *"

(29 USC § 158(a)(3))

* * * * *

"Sec. 10. (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to

make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

(29 USC § 160(f))